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No. 244 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, a Corporation, and JOHN W. HOWELL, an Individual,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1964.

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, a Corporation, and JOHN W. HOWELL, an Individual,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Chatsworth Cooperative Market Association, a Corporation, and John W. Howell, respectfully Petition this Honorable Court for the issuance of a Writ of Certiorari herein to review the judgment of the United States Court of Appeals for the Seventh Circuit, dismissing the Appeal of your Petitioner.

THE OPINIONS BELOW.

There are no written opinions of the District Court or of the Court of Appeals. The Order of the Court of Appeals, dismissing the Appeal, is included in the Appendix hereto.

JURISDICTION.

The jurisdiction of the Supreme Court is invoked under 62 Stat. 928, U.S.C. (1254(1)); 62 Stat. 961 as amended, 28 U.S.C. (2101 (c)); and 28 U.S.C. 2106.

The decision of the Court of Appeals en banc was entered on May 1, 1964.

Defendants-Appellants' Motion for a re-hearing en banc was denied on June 1, 1964, and the issuance of the Mandate was stayed until July 4, 1964, pending the filing of this Petition.

QUESTION PRESENTED.

May the U. S. Court of Appeals dismiss an appeal upon the Plaintiff-Appellee's motion, alleging the Order appealed from was not a final or Appealable Order, when the sole issue on Appeal is the constitutionality of the statute which vested the Plaintiff-Appellee with the power to initiate the suit as Plaintiff and the only legal means and procedure available to test the constitutionality of the Statute without subjecting the Defendants-Appellants to undue hardship is by a Motion to Dismiss.

STATUTE INVOLVED.

Judiciary and Judicial Procedure Act, 28 U.S.C.A. Section 1291; Section 1291 of the Act is set out in full in the Appendix hereto.

STATEMENT OF THE CASE.

This action was instituted in the U. S. District Court at Chicago, Illinois, by the Plaintiff, Interstate Commerce Commission, pursuant to the provisions of Section 204 (a) 6 and 222 (6) of Part II of the Interstate Commerce Act (Title 49 U.S. Code 304 (a) 6 and 322 (b), and under the

general laws and rules relative to suits in equity arising under the Constitution and laws of the United States.

Plaintiff, Interstate Commerce Commission, is seeking to obtain a permanent injunction against the Defendants, perpetually restraining the Defendants from engaging in any for-hire transportation business by motor vehicle in interstate and foreign commerce, and also seeking various other relief.

Defendant, Chatsworth Cooperative Marketing Association, is a Corporation, organized under the laws of the State of Illinois, and is engaged in the business of transporting for members and non-members, certain commodities in interstate commerce, pursuant to Title 49, U. S. Code, Section 303 (b) (5) and the Defendant, John W. Howell, is an Officer of Chatsworth Ccoperative Marketing Association.

The Defendants filed their Motion to Dismiss said cause of action, contending, among other reasons, that the enabling Statute, Title 49, U. S. Code, Section 322 (b), is unconstitutional, in that it violates the doctrine of separation of governmental powers in that it permits the Interstate Commerce Commission to initiate and prosecute a case or controversy in Court against individuals who allegedly violated the laws of the United States, and is further unconstitutional in that it fails to afford due process of law to the Defendants by permitting the Plaintiff to initiate the case at bar without having to obtain an independent appraisal of said cause on its merits by the Attorney General, who is the only law officer of the United States that has the right to determine whether or not to prosecute on behalf of the United States of America against one who has allegedly violated the laws of the land.

The Honorable Michael L. Igoe, District Judge, took said cause under advisement and on October 21, 1964, overruled the Defendants' Motion to Dismiss.

On November 5, 1963, the Honorable Michael L. Igoe, denied the Defendants' Motion for reconsideration of their Motion to Dismiss the Complaint and fixed supersedeas Bond of the Defendants in the sum of Five Hundred ($500.00) Dollars.

The Defendants then filed their Notice of Appeal and Bond in the District Court, and their Record and Brief in the United States Court of Appeals for the Seventh Circuit.

Thereafter, the Plaintiff filed a Motion to Dismiss Appeal, alleging that the Order appealed from was not a final and appealable Order.

On May 1, 1964, the Court of Appeals dismissed the Appeal and denied Defendants' request for oral argument, and on June 1, 1964, denied Defendants' Petition for Rehearing, and on June 4, 1964, the issuance of the Mandate was stayed until July 4, 1964, pending the filing of this Petition.

REASONS FOR GRANTING THE WRIT.

THE ISSUE INVOLVED HAS NEVER BEEN PRESENTED TO THIS HONORABLE COURT, AND IS ONE OF GRAVE NATIONAL CONCERN AND IMPORTANCE.

Although the Honorable Court has previously decided that generally, an Order overruling a Motion to Dismiss is not an appealable Order immediately reviewable, *Catlin* v. *U.S.*, 324 U.S. 229, this Honorable Court has never been presented with the issue of whether or not refusing an Appeal from an Order denying a Motion to Dismiss is a violation of due process.

In the present day practice of law, where Agencies have been created to act, pursuant to legislative authority, it is not, and will not, be uncommon or unusual to constitutionally challenge the right of Congress to empower Agencies with the authority to act in behalf of the United States of America. The only procedural method available to challenge the vesting of such authority, after a law suit has been instituted by such an Agency, is by a Motion to Dismiss.

As a result of the previous decisions of this Honorable Court, the Court of Appeals of the Seventh Circuit has taken the unwarranted position that all Orders denying a Motion to Dismiss, are not appealable Orders, regardless of the substance and content of the Motion to Dismiss. In the case of *Catling* v. *U.S., supra,* the Supreme Court set forth no such proposition. In interpreting Title 28 U. S. Code, Section 1291, this Court held that a final decision *generally* is one which ends the litigation on the merits (Emphasis Added) . . . Certainly, this is true whenever the question *may* be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or *in some other adequate manner.* (Emphasis Added)

In view of the fact that the Supreme Court has never decided that an Order denying a Motion to Dismiss is not a final decision, a denial of the right to appeal will likely recur. Because the question presented is of great national importance, and because it involves the correct construction of a Federal Statute in a field of law exclusively Federal, the question should be settled by this Court.

IT IS A VIOLATION OF DUE PROCESS TO DENY THE PETITIONERS THE RIGHT TO IMMEDIATELY CHALLENGE AND HAVE DECIDED THE CONSTITUTIONAL CAPACITY OF AN AGENCY OF THE FEDERAL GOVERNMENT.

The Fifth Amendment to the Constitution of the United States, provides that, "no person, . . . shall be deprived of life, liberty, or property without due process of law. . . ." It is well settled that this Amendment constitutes a restriction and safeguard upon the powers of the Federal Government in proceeding against its citizens.

In the case of *Pennoyer* v. *Neff*, 95 U.S. 714, the Supreme Court stated, "The term 'due process of law', when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the *protection* and *enforcement* of private rights." (Emphasis Added)

It was later held in the case of *Rochin* v. *People of California*, 345 U.S. 165 (1952), in the majority opinion delivered by Mr. Justice Frankfurter, "Due process of law as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that prosecutions cannot be brought about by methods that offend 'a sense of justice'".

As a result of the aforesaid and numerous Supreme Court decisions relating to the due process clause, "due process of law" has remained undefined for the sole purpose of affording due process.

It is the contention of the Petitioners that inclusive in the due process clause of the Fifth Amendment, are those elements which will essentially and necessarily insure a trial which is fundamentally fair.

> "In a general sense, the term 'trial' means the investigation and decision of a matter in issue between *parties* before a competent tribunal. . ." (88 C.J.S. Trials, Section 1) (Emphasis Added)

There can be no trial in our present system of jurisprudence, unless there are proper parties, a justiciable controversy and a Court of competent jurisdiction to hear and determine the controversy. It cannot be seriously contended that a fundamentally fair trial can be obtained by the Petitioners when one of the basic elements and essential ingredients of what is known as a trial in our system of jurisprudence is missing, to-wit: proper parties.

The sole issue pending in the Appeal before the Court of Appeals was whether or not the Respondent had authority to institute the initial proceedings as a Plaintiff. As a result of the uniqueness of the aforesaid issue, a decision by the Court of Appeals granting the Respondent's Motion to Dismiss the Appeal was, for all intents and purposes, a denial of the Petitioners' appeal without judicial consideration or reflection, and without legal reason or support.

It is the contention of the Petitioners that the decision rendered by the Court of Appeals, dismissing the Appeal, would force the Petitioners to engage in a "trial" without having determined whether a "trial," as contemplated in our system of justice and by the due process clause of the Fifth Amendment, can, in fact take place; thereby depriving the Petitioners of property without due process in violation of the Fifth Amendment to the Constitution of the United States.

AN APPEAL FROM AN ORDER OVERRULING A MOTION TO DISMISS WHEN THE SOLE ISSUE GENERATED IS WHETHER OR NOT THE PLAINTIFF HAS CONSTITUTIONAL AUTHORITY TO ACT AS A PARTY PLAINTIFF IS A FINAL, APPEALABLE ORDER.

The relief sought by the Respondent in instituting the Suit was to permanently restrain the Petitioners from operating a present existing business. It does not seek to restrain a portion of its business, but rather their entire business. In the event the Respondent would be successful at the trial, the Petitioners' entire business operations would be extinguished, pending a decision by the Court of Appeals, not only as to the issues generated at the trial, but also the separate, distinct issue of whether or not the Respondent had any legal right to initiate the suit. Because of the grotesque consequences that would result in refusing to determine in the first instance whether or not the Respondent has a right to initiate the suit, an Order denying a Motion to Dismiss should be a final, appealable Order.

The Petitioners are not contending that every constitutional challenge of a Statute should be determined by a Court of Appeals before the trial of all the issues. It is understood that when the substantive aspect of a Statute is constitutionally challenged, a complete trial of all of the issues of fact and law is prerequisite to an Appeal, regardless of the pre-trial determinations upholding the constitutionality of the Statute, the reason being that one of the main issues in determining the substantive constitutionality of the law is, how does the law, in its application, affect the rights of those claiming it to be unconstitutional. The aforesaid necessarily requires a hearing pertaining to the facts and circumstances involved in the particular case.

However, when the procedural aspect of a law is constitutionally challenged, a pre-trial decision upholding the constitutionality of such procedure is final. Any facts or circumstances subsequently obtained at the trial of the issues will not affect, nor will they be germane to the issues of whether or not the procedural aspect of the law is constitutional.

It has long been established that the Courts are the watchdogs over the administrative Agencies to protect citizens against an abuse of procedure which results in a lack of due process.

Is it to be said that because Congress has spoken as to a procedure, the watchful eyes of the Courts should no longer be utilized?

There is no nomenclature, legal terminology or label available to the Petitioners to attack the right of the Respondent to institute the suit other than a Motion to Dismiss. Is it uncontroverted that the Petitioners have the right to challenge the constitutionality of the Statute enabling the Respondent to initiate the suit, but because of the label used and further, because of the general interpretation that all Orders denying a Motion to Dismiss are not final decisions, the Court of Appeals has denied the right to immediately appeal an adverse decision regarding the constitutionality of a Statute.

The Petitioners contend that it is the substance of the Motion to Dismiss rather than its form that should be the factor in determining whether or not an Order denying a Motion to Dismiss is a final decision as contemplated by Title 28, U.S. Code, Section 1291.

CONCLUSION

Petitioners respectfully request that this Court grant its prayer for Writ of Certiorari to review the decision herein of the Court of Appeals for the Seventh Circuit. Uncertainty now exists as to the correct construction of a Federal Statute in a field of law exclusively Federal. The question presented is of grave importance throughout the Nation, and should be settled by this Court.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

May 1, 1964

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

INTERSTATE COMMERCE COMMISSION,
Plaintiff-Appellee,
No. 14438 *vs.*
CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, a Corporation,
and
JOHN W. HOWELL, an Individual,
Defendants-Appellants.

Order Dismissing Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion of the Interstate Commerce Commission, plaintiff-appellee, to dismiss the appeal herein; the reply of defendants-appellants to said motion; and the request of defendants-appellants for oral argument;

And it appearing to the Court that the order sought to be appealed from is not a final appealable order;

It Is Ordered that the request of the defendants-appellants for oral argument is denied and that the motion of plaintiff-appellee to dismiss this appeal is granted and that said appeal is hereby dismissed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60610

Monday, June 1, 1964

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

INTERSTATE COMMERCE COMMISSION,
Plaintiff-Appellee,
No. 14438 *vs.*
CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, a Corporation,
and
JOHN W. HOWELL, an Individual,
Defendants-Appellants.

Order Dismissing Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that defendants-appellants' Petition for Rehearing in the above entitled cause be, and the same is hereby, Denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois, 60610

Thursday, June 4, 1964

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

INTERSTATE COMMERCE COMMISSION, *Plaintiff-Appellee,* vs. CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, a Corporation, and JOHN W. HOWELL, an Individual, *Defendants-Appellants.* No. 14438	Order Dismissing Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion and affidavit of counsel for defendants-appellants, counsel for plaintiff-appellee having filed no objections thereto,

It Is Ordered that the issuance of the mandate of this Court be stayed for a period of thirty (30) days in accordance with the provisiosn of Rule 28 of the Rules of this Court.

U.S. Constitution, Fifth Amendment—Due Process.

"no person . . . shall be deprived of life, liberty or property without due process of law. . ."

28 U.S.C. Section 1291. Final decisions of district courts.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. Section 1254. Courts of appeals; certiorari; appeal; certified questions.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment of decree; * * *."

28 U.S.C. Section 2101. Supreme Court; time for appeal or Certiorari; docketing; stay.

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

28 U.S.C. Section 2106. Determination.

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate

judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

49 U.S.C. Section 303 (b)(5). Definitions and exceptions.

Nothing in this chapter, except the provisions of Section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (5) motor vehicles controlled and operated by a cooperative association as defined in section 1141-1141d and 1141j of Title 12, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined;

49—U.S.C. Section 322 (b) Jurisdiction of District Courts

If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the District Court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.

88 C.J.S. Section 1, Page 19.

"In a general sense, the term "trial" means the investigation and decision of a matter in issue between parties before a competent tribunal. . ."

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In the Supreme Court of the United States

OCTOBER TERM, 1964

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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Washington, D. C., 20530.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission,
Washington, D. C., 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1964

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v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

The issue in this case is whether the court of appeals correctly held that the denial of a motion to dismiss is not a final appealable order.

This proceeding was instituted by the Interstate Commerce Commission in the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to Section 222(b) of the Interstate Commerce Act, 49 U.S.C. 322(b), to enjoin the two petitioners from engaging in any interstate for-hire transportation by motor vehicle without first obtaining the requisite operating authority from the

Commission. Petitioners filed a motion to dismiss, alleging that Section 222(b) is unconstitutional insofar as it empowers the Interstate Commerce Commission to file a suit seeking to enjoin operations conducted in violation of the provisions of the Motor Carrier Act. The claim is that the provision is unconstitutional because it gives the Commission authority to initiate the injunctive proceeding without approval of the Attorney General and thus violates the doctrine of separation of powers. The motion to dismiss was denied by the district court and the court of appeals dismissed the appeal on the ground that the order of the district court was not a final appealable order (Pet. 1a).

It is clear that petitioners' argument is without merit. The denial of a motion to dismiss is not a final decision and is not appealable even if the question raised is a constitutional one. 28 U.S.C. 1291; *Catlin* v. *United States*, 324 U.S. 229, 236; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30-31.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

JULY 1964.

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vs.

INTERSTATE COMMERCE COMMISSION
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO RESPONDENT'S MEMORANDUM

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

REPLY TO RESPONDENT'S MEMORANDUM

The Respondent's Memorandum, in opposition to the Petitioners' Petition for Writ of Certiorari is erroneous in its statement of facts and in its statement of law in the following respects:

The issues raised by the Petitioners' Motion to Dismiss were not, and are not that the Statute involved is unconstitutional as a violation of the doctrine of separation of powers because it gives the Commission authority to initiate an injunctive proceeding without the approval of the Attorney General, as stated on Page 2 of the Memorandum of Respondent In Opposition.

The first issue raised by the Petitioners' Motion To Dismiss, was clearly set forth on Page 3 of the Petitioners' Petition of Writ of Certiorari. The enabling Statute violates the doctrine of separation of powers because it vests in the Interstate Commerce Commission the authority to initiate as a party and prosecute in its own right, a case or controversy against a citizen or citizens who have allegedly violated the laws of the United States. It is apparent that such a Statute is an attempt to vest authority in the Respondent to act as the law enforcement agent of the United States. The Petitioners' Motion to Dismiss clearly points out that the vesting of such authority is a violation of the Constitutional doctrine of separation of powers, in that it confers upon an administrative body, judicial functions and endeavors to transfer administrative discretion to a Court of law.

The second issue raised by the Petitioners' Motion to Dismiss, also as clearly set forth on Page 3 of the Petitioners' Petition for Writ of Certiorari, is that the enabling Statute is un-constitutional because it eliminates the role of the Attorney General as the law officer of the United States and his right therein to determine whether or not to prosecute for violations of the laws of the United States. It is the Petitioners' contention that such an elimination of the Attorney General is a denial of due process of law as guaranteed by the Constitution of the United States. The aforesaid contention was clearly set forth in the Petitioners' Motion to Dismiss.

The Respondent's Memorandum In Opposition to the Petitioners' Petition for Writ of Certiorari states "that even if the question raised on a Motion to Dismiss is a Constitutional one, . ." a denial of a Motion to Dismiss is not a final decision and is not an appealable Order.

The Petitioners have not contended that a denial of a Motion To Dismiss, merely because the latter involves a Constitutional question, is a final, appealable order. As specifically set forth on Page 8 of the Petitioners' Petition for Writ of Certiorari, it is the Petitioners' contention that when the procedural properties or aspect of a Statute are Constitutionally challenged by the only means available to so challenge; *i. e.*, a Motion to Dismiss, an Order denying the Motion to Dismiss is a final decision and definitely an appealable Order, for no circumstances, evidence or law at the level wherein the motion to dismiss was denied, can or will have any effect upon the decision to deny the Motion to Dismiss.

Wherefore, your Petitioners respectfully pray that this Honorable Court grant its prayer for a Writ of Certiorari.

Respectfully submitted,

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PETITION FOR REHEARING OF DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

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Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION,

Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners respectfully request a rehearing of its Petition for Certiorari, denied by the Court's Order of October 12th, 1964.

To refresh the Court as to the nature of the case: Petitioners filed a Motion to Dismiss in the U.S. District Court, alleging that Congress usurped its authority and unconstitutionally delegated the power to the Respondent to act as party plaintiff in a civil proceeding, and as a result, the Respondent had no legal standing in court.

The Motion was denied, bond for appeal was set, and an appeal was taken to the U.S. Court of Appeals for the Seventh Circuit.

After the Petitioners had filed bond and filed its Abstract and Briefs, the Respondent filed a Motion to Dismiss the appeal, alleging as its only point that since the Order appealed from was an Order denying a Motion to Dismiss, the Order was not final or appealable.

The Court of Appeals for the Seventh Circuit, without a written opinion and without considering the merits of the appeal or issues presented by the appeal, granted the Respondent's Motion to Dismiss the appeal.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. The apparent holding of the Court of Appeals is that any order denying a motion to dismiss is not a final appealable order and the Court need not look further. The aforesaid is the only legal and logical conclusion because the only issue raised by the Respondent in the motion to dismiss the appeal was that since the order appealed from was an order denying a motion to dismiss, the order was not final or appealable.

The aforesaid fact was not pointed out to this Honorable Court in the Petition for Writ of Certiorari. As a result, when this Court denied the Petition for Writ of Certiorari, it affirmed a holding that is in irreconcilable conflict with previous decisions of this Court and a conflict now exists between the Fifth and Seventh Circuits of the Courts of Appeal.

2. In the case of *United States of America* v. *John Q. Woods, et al.*, 295 F. 2d 772 (1961), Certiorari denied 369 U.S. 850, 8 L. Ed. 2d 9, 82 S. Ct. 933 (1962), the Court

of Appeals from the Fifth Circuit in deciding whether or not an order is final and appealable as prescribed by 28 U.S.C.A., Section 1291, held at page 778:

> "On the basis of these cases, we feel that the Supreme Court has approved a *practical* construction of Section 1291, and that an order, otherwise non-appealable, determining substantial rights of the parties which will be irreparably lost if review is delayed until final judgment may be appealable under Section 1291." (Emphasis Added)

In *Cohen* v. *Beneficial Indus. Loan Corp.*, (1949), 337 U.S. 541, 69 S. Ct. 1221, 1225, 93 L. Ed. 1528, this Court held that the purpose of Section 1291 is to disallow appeal from any decision which is tentative, informal or incomplete, or from a consummated decision which is a mere step towards a final judgment with which it will merge. The Court found, however, that the collateral issue involved in that case was not of such a nature, and went on to state:

> "When that time comes (to appeal the final disposition of the case), it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."

This Court then held the order to be appealable within the meaning of Section 1291, and concluded:

> "This Court has long given this provision of the statute this practical rather than technical construction."

The aforesaid rule was later summarized by Mr. Justice Frankfurter in his concurring opinion in *Sears, Roebuck & Co.* v. *Mackey*, 1956, 351 U.S. 427, 441, 76 S. Ct. 895, 903:

> "Thus the Court has permitted appeal before completion of the whole litigation when failure to do so would preclude any effective review or would result in irreparable injury."

The constitutional rights of a citizen of the United States preclude Congress from enacting legislation which violate the doctrine of separation of powers and the due process clause of the Fifth Amendment. The right of the Respondent to act as a party plaintiff has been challenged as a violation of the Petitioners' aforementioned constitutional rights by the only procedural means available, to-wit: "motion to dismiss".

If an order denying a motion to dismiss under the aforesaid circumstances is not appealable, then the holding of this Court in the *Cohen* case, *supra,* is meaningless, because: to compel the Petitioners to wait until the final disposition of the case, would be too late to effectively review the order denying the Petitioners' motion to dismiss. The constitutional rights of the Petitioners, if applicable, would be lost, because they would be forced to proceed to defend while their constitutional rights cry out to prohibit anyone to compel them to defend such an action. Once the petitioners are compelled to defend, their constitutional right has been lost.

This case presents the question of whether standards set by this Court in determining the appealability of an order may be eroded away by the Courts of Appeal which do not even purport to find that which this Court has said is the *sine qua non* for holding an order to be appealable or non-appealable.

One of the landmark cases in the law, *Hickman* v. *Taylor*, 329 U.S. 495, would not exist if this Court did not, on occasion, review its denial of petitions for certiorari. (327 U.S. 808, 328 U.S. 876). The case at bar merits the review of this Court.

CONCLUSION.

For the reasons set forth herein and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon rehearing, a Writ of Certiorari issue to the Court of Appeals for the Seventh Circuit.

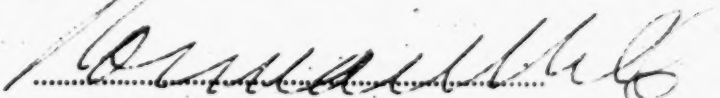
Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith, and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.



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